

1964

Metropolitan Water District of Provo City v. Provo River Water Users' Association : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Metropolitan Water District v. Provo River Water Users Ass'n*, No. 10000 (Utah Supreme Court, 1964).
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IN THE SUPREME COURT
of the
STATE OF UTAH

METROPOLITAN WATER
DISTRICT OF PROVO CITY,
a public corporation,
Plaintiff-Respondent,

vs.

PROVO RIVER WATER
USERS ASSOCIATION,
a corporation,
Defendant-Appellant.

Case No.
10,000

BRIEF OF APPELLANT

Appeal From The Judgment Of The Fourth
Judicial District Court For Utah County
Hon. Joseph E. Nelson, Judge

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IN THE SUPREME COURT
of the
STATE OF UTAH

METROPOLITAN WATER
DISTRICT OF PROVO CITY,
a public corporation,

Plaintiff-Respondent,

vs.

PROVO RIVER WATER
USERS ASSOCIATION,
a corporation,

Defendant-Appellant.

Case No.
10,000

BRIEF OF APPELLANT

NATURE OF CASE

This is an action to determine as between respondent (plaintiff) and appellant (defendant) which is entitled to the interest and income derived from the investment of \$6,000.00 paid by respondent to appellant on December 2, 1946 necessary and preparatory to the execution of an Amendatory Stock Subscription Contract between respondent and appellant dated February 3, 1947 whereby the original contract under which respondent subscribed for stock in appellant corporation was amended to increase the maximum indebtedness of respondent to appellant.

Appellant contends that the \$6,000.00 was a

payment to appellant on the purchase price of the stock, thereby reducing by \$6,000.00 respondent's then existing indebtedness to appellant as expressly recited in the Amendatory Subscription Contract, and thereupon the \$6,000.00 became the absolute property of appellant and any interest earned on the investment thereof likewise belongs to appellant. Respondent contends that the \$6,000.00 was delivered to appellant upon a mutual understanding that the proceeds would be held and invested by appellant until such time as payments to the United States would become due under appellant's contract with the United States and that the interest derived from such investment should accrue to the credit of the respondent.

DISPOSITION BY TRIAL COURT

The trial court found that the \$6,000.00 was delivered to appellant upon a mutual understanding that the same would be invested and the interest derived therefrom would accrue to respondent, and held that the respondent was entitled to the income and interest derived from such investment, both past and future, and ordered appellant to

(a) keep the \$6,000.00 invested at the highest rate of interest consistent with safety;

(b) pay the \$6,000.00 over to the United States when the first payment shall become due to the United States from appellant under a supplemental contract between

appellant and the United States, and to give respondent credit therefor on its indebtedness to appellant; and

(c) give respondent credit for all interest and income derived from the investment of the \$6,000.00 on any payment, whether classed as installments, assessments or otherwise, which may hereafter become due to appellant from respondent under their amendatory subscription contract.

RELIEF SOUGHT BY APPELLANT

By this appeal appellant seeks a reversal of the decision of the trial court by setting aside the Findings Of Fact, Conclusions Of Law and Judgment entered and directing the entry of new Findings Of Fact, Conclusions Of Law and Judgment adjudging

(a) that the \$6,000.00 was a payment by respondent to appellant on the purchase price of the stock and that the indebtedness of respondent to appellant under its stock subscription contract with appellant was thereby reduced by the sum of \$6,000.00;

(b) that the \$6,000.00 became and is the property of appellant, and appellant is entitled to all interest and income derived from the investment thereof; and

(c) that the respondent has no claim or right to the interest or income derived from the investment of the \$6,000.00.

STATEMENT OF FACTS

Plaintiff-Respondent is a metropolitan water district organized and existing under the provisions of what is now Chapter 8, Title 73, Utah Code Annotated 1953. Defendant-Appellant is a corporation organized and existing under the laws of the State of Utah primarily for the purpose of contracting with the United States of America for the repayment of the cost of construction of the Deer Creek Division of the Provo River Project and for the operation and maintenance thereof. Respondent is one of the subscribers of stock of appellant corporation.

To accomplish its purpose appellant entered into a series of written contracts with the United States of America, acting through its Bureau of Reclamation. Under the terms of the original contract dated June 27, 1936 (Pl. Exh. 2), as amended on July 3, 1937 (Pl. Exh. 3), the United States in substance agreed to expend up to \$7,600,000.00 towards the construction of the Project, which appellant agreed to repay without interest in forty equal annual installments (Fdg. 3 — R. 119, 120; Pl. Exh. 2, par. 17).

On September 18, 1937 respondent and appellant entered into a stock subscription contract whereby respondent subscribed for eight thousand (8,000) shares of stock of appellant corporation and agreed to pay appellant therefor the full purchase price thereof, which was defined as that proportion of

the total sums and charges required to be paid by appellant to the United States that the eight thousand (8,000) shares bears to the total number of shares outstanding (100,000); provided, however, that the total purchase price shall not exceed the sum of \$608,000.00 (eight percent of \$7,600,000.00) (Fdg. 4 — R. 120; Pl. Exh. 4, par. 8, 9, 15). In addition thereto respondent agreed to pay appellant a proportionate share of the default of the other stockholders; provided, however, that respondent's proportionate share thereof would not exceed \$212,800.00 (Pl. Exh. 4, par. 15). The payments were to be made by respondent when assessed by appellant in order that appellant could make its payments to the United States (Pl. Exh. 4, par. 8). Respondent further agreed to pay appellant the assessments levied for respondent's share of the general corporate expenses and expenses of the operation and maintenance of the Project (Pl. Exh. 4, par. 14).

In 1946 it became apparent that the expenditure of \$7,600,000.00 by the United States would not be sufficient to complete the Project. Negotiations were then undertaken with the United States towards a supplemental contract under which the United States would commit itself to expend a total of \$11,400,000.00 towards the construction of the Project, which appellant would repay in forty equal annual installments (Fdg. 5, Tr. 120).

To accomplish that objective it became neces-

sary for the subscribers of appellant's stock either (a) to amend their respective subscription contracts and thereby increase their respective indebtednesses to appellant to secure payment of the additional indebtedness by the appellant to the United States or (b) to proportionately reduce their respective amounts of stock subscribed for (Tr. 36, 37). All of the subscribers, including respondent, elected to amend their respective subscription contracts and proportionately assume the additional indebtedness to appellant. However, the additional obligation for which respondent would thereby become indebted to appellant would exceed its debt limitation as fixed by the then existing Section 100-10-18 (g), Utah Code Annotated 1943 by the sum of \$6,000.00 (Complaint par. 6 — R. 4, 5; Tr. 37, 107, 109; Fdg. 6 — R. 121).

On November 20, 1946 respondent adopted an Ordinance declaring that the interest of respondent required the execution of the Amendatory Subscription Contract and calling for an election of the qualified electorate of the respondent District to vote thereon. The Ordinance contained verbatim the language of the entire proposed Amendatory Subscription Contract (Df. Exh. 24).

On December 2, 1946, being two days prior to the election, respondent delivered to appellant respondent's check in the sum of \$6,000.00 (Fdg. 7 — R. 121; Pl. Exh. 7).

The election by the qualified voters of the respondent District was held on December 4, 1946 and the proposed Amendatory Subscription Contract was approved by a majority of the votes cast (Df. Exh. 25, p. 3).

On December 20, 1946 appellant entered into a supplemental contract with the United States (Pl. Exh. 5) under the terms of which the United States agreed to expend a total of \$11,400,000.00 in the construction of the Project and appellant agreed to pay to the United States the cost thereof, without interest, not to exceed \$11,400,000.00 (Pl. Exh. 5, par. 7). Payments were to be made in forty equal annual installments, the first of which would become due and payable on January 15 of the year following six months' notice from the Secretary of Interior that the \$11,400,000.00 have been expended or that the works were ready for use (Pl. Exh. 5, par. 9).

On February 3, 1947 respondent and appellant entered into an Amendatory Subscription Contract (Pl. Exh. 6) wherein paragraph 15 of the original Subscription Contract (Pl. Exh. 4) was amended to read as follows:

“15. Anything herein to the contrary notwithstanding, it is agreed that the total aggregate liability of the District for payment under the terms of this contract

“(a) To the Association (appellant), for the purchase price of the stock of the District (respondent) in the Association shall

not exceed the sum of \$912,000, less \$6,000 previously paid by the District to the Association on the purchase price of said stock; and

“(b) To the Association, on account of the default of some other stockholders in the payment of the purchase price of the stock of such other stockholders in the Association shall not exceed the sum of \$319,200.”

None of the previous contracts between the appellant and the United States obligated the United States to complete the Project so on February 2, 1949 appellant entered into a further contract in writing with the United States whereby the United States agreed, among other things, to expend such sums of money in excess of \$11,400,000.00 as may be necessary to complete the Project and appellant agreed to use the Project water supply and facilities and to pay therefor annual rates as fixed by the United States (Fdg. 5 — R. 120) The United States agreed to suspend the equal annual installment payments on the \$11,400,000.00 required under the Supplemental Contract (Pl. Exh. 5) until the expenditures in excess thereof made by the United States have been paid in full by the appellant to the United States.

None of the payments provided for in the \$11,400,000.00 contract between appellant and the United States has become due or payable by appellant to the United States and no payment thereunder will become due until after the expenditures on the

Project in excess of \$11,400,000.00 have been repaid by appellant to the United States, which will not occur until several years in the future (Fdg. 5 — R. 121). *No contract exists between the respondent District and the United States pertaining to this Project.*

The \$6,000.00 paid by respondent to appellant was invested by appellant in government bonds on or about the first part of May, 1947, and the interest earned thereon as of December 31, 1961 was \$2,258.92, which has been re-invested by the appellant (Fdg. 11 — R. 122).

On February 5, 1947, being two days after the execution of the Amendatory Subscription Contract, a resolution was unanimously adopted by all of the stockholders of appellant corporation, including respondent, providing that the \$6,000.00 paid to appellant by respondent be credited to the account of respondent on its contractual obligation for the purchase of stock in the appellant corporation, and that the \$6,000.00 be deducted from the first contract assessments (Df. Exh. 29, p. 3). On March 14, 1947, being six weeks after the execution of the Amendatory Subscription Contract, a motion was passed by the Board of Directors of appellant corporation providing that the \$6,000.00 paid to appellant by respondent not be mingled with the appellant's general funds, but that it be placed in a separate account and invested at the highest rate of interest consistent with safety with the interest on the in-

vestment to accrue to the credit of respondent (Fdg. 10 — R. 122; Pl. Exh. 1, p. 3).

From 1947 to 1960, inclusive, the auditor's reports on appellant's books show that the \$6,000.00, together with interest accruals, was credited to the stock subscription account of respondent (Fdgs. 12, 13 — R. 122, 123). In 1961 the auditor's report was changed to show that the \$6,000.00, together with interest accruals, was credited to the general stockholders equity account (Df. Exh. 23, p. 4; Tr. 88, 89).

No question arose with respect to the interest accruals on the investment of the \$6,000.00 until March 11, 1955, at which time director Harris advised the Board of Directors of appellant corporation that such moneys belonged to the appellant and would have to remain with appellant until the first payment is made on the subscription contract debt (Tr. 14; Pl. Exh. 8, p. 2). The issue arose again on April 8, 1960, at which time director Harris again advised that the \$6,000.00 was a payment on respondent's subscription contract debt and the return of the bonds would, therefore, constitute a gift (Df. Exh. 30, p. 1). Finally, at the Board of Directors' meeting of appellant held on April 20, 1962 a motion was passed, as amended on May 18, 1962, declaring that the interest accruals on the investment of the \$6,000.00 are the property of appellant and that respondent had no interest therein (Pl. Exh. 21, p. 5). Thereafter this suit was com-

menced on August 24, 1962 and was tried on June 25, 1963 to the court sitting without a jury, the Honorable Joseph E. Nelson presiding.

The trial court found that the \$6,000.00 check was delivered to appellant on December 2, 1946 upon a mutual understanding that the proceeds would be held and invested by appellant until such time as payments to the United States would be required under appellant's contract with the United States and under the then proposed Amendatory Subscription Contract between respondent and appellant, and that the interest received from such investment would accrue to the credit of respondent (Fdg. 7 — R. 121). It then concluded that appellant holds the \$6,000.00 for the sole purpose of paying the same over to the United States when, as and if annual installments on the \$11,400,000.00 to be paid to the United States by appellant commence under the contract between appellant and the United States (Concl. 1 — R. 123). The trial court entered its Judgment ordering appellant to keep the said \$6,000.00 invested at the highest rate of interest consistent with safety and to pay the same over to the United States when the first payment shall become due to the United States from appellant under the \$11,400,000.00 contract. It then adjudged that the interest and dividends heretofore and hereafter received by appellant attributable to the investment of the \$6,000.00, including interest on interest, are the property of the respondent (Judgment — R. 125, 126).

With such Findings, Conclusions and Judgment appellant strongly disagrees and urges that there is no competent evidence in the record to support such Findings and that the Conclusions and Judgment are contrary to law. What is more, the trial court then ordered appellant to give respondent credit for all interest on any payments, whether classed as installments, assessments or otherwise, which may hereafter become due appellant by respondent under its stock subscription contract (Judgment — R. 126). In so doing the trial court awarded respondent relief beyond that to which respondent was entitled or claimed under the pleadings or proof.

Appellant filed its Motion For New Trial, specifically pointing out the errors of law committed by the trial court (R. 133, 134) and filed its Motion To Alter Findings Of Fact, Conclusions Of Law and Judgment, specifying in detail the amendments necessary to conform to the evidence and law of this case (R. 127-132, incl.). On September 13, 1963 the court entered its Order denying appellant's Motion To Alter Findings Of Fact, Conclusions Of Law and Judgment and Motion For New Trial (R. 137). On October 7, 1963 appellant filed its Notice Of Appeal herein (R. 138).

STATEMENT OF POINTS

POINT I.

THE DELIVERY OF RESPONDENT'S CHECK IN THE SUM OF \$6,000.00 TO APPELLANT CONSTITUTED A VOUNTARY AND UNCONDITIONAL PAYMENT ON RESPONDENT'S INDEBTEDNESS TO APPEL-

LANT, AND OWNERSHIP THEREOF HAD TO PASS TO APPELLANT IN ORDER THAT THE INDEBTEDNESS WOULD THEREBY BE REDUCED BY \$6,000.00.

POINT II.

THE TRIAL COURT ERRED IN RECEIVING EVIDENCE OF CONVERSATIONS PRE-DATING THE AMENDATORY SUBSCRIPTION CONTRACT OF FEBRUARY 3, 1947 WHICH TENDED TO ALTER AND MODIFY THE TERMS THEREOF IN VIOLATION OF THE PAROL EVIDENCE RULE.

POINT III.

THERE IS NO COMPETENT EVIDENCE TO SUPPORT THE FINDINGS OF THE TRIAL COURT THAT THE \$6,000.00 WAS CONDITIONALLY DELIVERED TO APPELLANT UPON A MUTUAL UNDERSTANDING THAT THE SAME WOULD BE INVESTED AND THE INTEREST RECEIVED FROM SUCH INVESTMENT WOULD ACCRUE TO RESPONDENT OR THAT APPELLANT WAS BOUND THEREBY.

POINT. IV.

THE CLAIMED ORAL AGREEMENT WOULD BE VOID AS BEING AN ILLEGAL CONTRACT TO VIOLATE THE PROVISIONS OF THE THEN EXISTING SECTION 100-10-18 (g), UTAH CODE ANNOTATED 1943, AND THE TRIAL COURT ERRED IN ITS CONCLUSIONS AND JUDGMENT IN ENFORCING THE SAME.

POINT V.

THE CLAIMED ORAL AGREEMENT WOULD NULLIFY THE ELECTION OF THE VOTERS OF RESPONDENT DISTRICT HELD ON DECEMBER 4, 1946 TO APPROVE THE PROPOSED AMENDATORY SUBSCRIPTION CONTRACT AND WOULD VOID THE AMENDATORY SUBSCRIPTION CONTRACT DATED FEBRUARY 3, 1947 AND THE EXECUTION THEREOF.

POINT VI.

RESPONDENT ACQUIRED NO RIGHTS IN AND TO THE INTEREST ACCRUALS FROM THE INVESTMENT OF THE \$6,000.00 PAYMENT BY REASON OF THE MOTION PASSED AT THE APPELLANT DIRECTORS' MEETING OF MARCH 14, 1947.

POINT VII.

THE TRIAL COURT ERRED IN MAKING FINDINGS OF FACT NOS. 9 TO 14, INCLUSIVE, AS TO EVENTS SUBSEQUENT TO THE EXECUTION OF THE AMENDATORY SUBSCRIPTION CONTRACT BETWEEN THE PARTIES DATED FEBRUARY 3, 1947.

POINT VIII.

THE COURT ERRED IN ITS JUDGMENT BY GRANTING RELIEF TO RESPONDENT BEYOND THAT TO WHICH IT WAS ENTITLED OR CLAIMED AND BEYOND THE PLEADINGS AND PROOF IN THIS CASE.

ARGUMENT

POINT I.

THE DELIVERY OF RESPONDENT'S CHECK IN THE SUM OF \$6,000.00 TO APPELLANT CONSTITUTED A VOUNTARY AND UNCONDITIONAL PAYMENT ON RESPONDENT'S INDEBTEDNESS TO APPELLANT, AND OWNERSHIP THEREOF HAD TO PASS TO APPELLANT IN ORDER THAT THE INDEBTEDNESS WOULD THEREBY BE REDUCED BY \$6,000.00.

On December 2, 1946 respondent delivered to appellant its check in the sum of \$6,000.00 (Fdg. 7 — R. 121). The check itself does not recite what it was for, nor does it bear any conditions of delivery (Pl. Exh. 7) nor was there any evidence to show that its delivery was accompanied by a letter of transmittal or statements made at the time of de-

livery imposing conditions thereon. The trial court made no finding as to whether it was a payment on the purchase price of the stock, nor a finding as to whether the indebtedness of respondent to appellant was thereby or ever reduced. It simply made a vague finding that the check was delivered upon a mutual understanding that the proceeds would be held and invested by appellant until such time as payments to the United States would be required under appellant's contract with the United States and to appellant under the then proposed Amendatory Subscription Contract (Fdg. 7 — R. 121).

In spite of what the trial court said or did not say about it, the \$6,000.00 was a payment by respondent to appellant on the purchase price of the stock and is a fact accomplished. Likewise the \$6,000.00 reduction of respondent's indebtedness to appellant by reason of said payment is a fact accomplished. This, we submit, is the crux of this lawsuit. Both facts are unequivocally stated as having been accomplished in a formal instrument in writing, i.e. the Amendatory Subscription Contract between respondent and appellant dated February 3, 1947, wherein the parties agreed that the total aggregate liability of the respondent to appellant for the purchase prices of the stock

“ . . . shall not exceed the sum of \$912,000.00 less \$6,000.00 *PREVIOUSLY PAID by the District (respondent) to the Association (appellant) on the purchase price of the*

stock." (Emphasis added) (Pl. Exh. 6, par. 15)

Thus, the avowed purpose of the \$6,000.00 as formally declared by respondent was a payment and corresponding reduction in the indebtedness. And it fits squarely into the elementary definition of a payment, i.e. the discharge of a debt in whole or in part, *Words And Phrases, Payment, Vol. 31A, Permanent Edition, pp. 216, 233*. And to constitute payment, money must pass from the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for the same purpose. *40 Am. Jur., Payment, Section 4, p. 716; Section 2, p. 715*. Having so agreed, avowed and declared, how then can respondent now be heard to complain that the delivery of the \$6,000.00 was not a payment and claim that it was a conditional delivery of money to be used for a special purpose? Suffice it to say, when the \$6,000.00 check was delivered to appellant the money passed to appellant for the purpose of reducing respondent's indebtedness to appellant and as such became the property of appellant. It is just that simple, and it cannot be otherwise.

Respondent conceded in its answer to Interrogatory No. 3 (R. 22) that its indebtedness to appellant was reduced by \$6,000.00 at the time the Amendatory Subscription Contract was entered into. Having thus conceded, that should have put an end to this controversy without anything further. And

so appellant filed its Motion For Summary Judgment, dated November 26, 1962 (R. 91, 92) supported by the Affidavit of its secretary (R. 28, 29, 30) together with attached Exhibits "A" to "E", inclusive (R. 31-80, incl.) and Exhibit "F" (R. 93-96, incl.), which we submit should have been granted by the trial court but which was denied (R. 110). This we urge was error.

The trial court then went on to hear the case and decide the same without making findings on whether the \$6,000.00 constituted a payment or whether the respondent's indebtedness had been reduced. The proper application of the law to the evidence in this case would compel findings in the affirmative thereon. The failure of the trial court to so do led to its erroneous Judgment in this case, which we submit must be unequivocally reversed.

POINT II.

THE TRIAL COURT ERRED IN RECEIVING EVIDENCE OF CONVERSATIONS PRE-DATING THE AMENDATORY SUBSCRIPTION CONTRACT OF FEBRUARY 3, 1947 WHICH TENDED TO ALTER AND MODIFY THE TERMS THEREOF IN VIOLATION OF THE PAROL EVIDENCE RULE.

The rights and duties of the parties were fixed by the terms of the written Amendatory Subscription Contract dated February 3, 1947 as of that date (Pl. Exh. 6) All of the negotiations, deals, arrangements and the like made prior thereto or contemporaneously therewith pertaining to the subject matter thereof were merged into that instrument.

The parties thereby agreed that the total indebtedness of the respondent to the appellant for the purchase price of the stock shall not exceed the sum of \$912,000.00 (eight percent of \$11,400,000.00) less \$6,000.00 previously paid thereon, i.e. \$906,000.00 (Pl. Exh. 6, par. 15). Thus the indebtedness incurred by respondent was \$6,000.00 less than it would have been had the \$6,000.00 not been paid. The parties thereby formally agreed that the \$6,000.00 had been paid for that very purpose. It is just that plain. There is no ambiguity to explain. Nor did the trial court make any finding that the particular provision of the Amendatory Subscription Contract was ambiguous.

It is elementary that parol evidence is inadmissible to vary the provisions of a written contract unless the contract contains ambiguities which must be resolved. *Davis v. Payne & Day Inc.*, 10 Utah (2d) 53, 348 Pac. (2d) 337; *Hatch v. Adams*, 8 Utah (2d) 82, 329 Pac. (2d) 285; *Continental Bank & Trust Company v. Bybee*, 6 Utah (2d) 98, 306 Pac. (2d) 773.

The parol evidence rule forecloses all events which precede or accompany a written integration. *Wilson v. Gardener*, 10 Utah (2d) 89, 348 Pac. (2d) 931; *Degnan, Parol Evidence — Utah Version*, 5 *Utah Law Review* 158.

In the instant case the trial court permitted the witness John O. Beesley to testify, over appellant's objection (Tr. 39) as to a conversation which

he had with Fisher Harris in Salt Lake City, Utah shortly after November 8, 1946 pertaining to a plan and scheme of Mr. Beesley for the respondent to advance \$6,000.00 to the appellant to be invested in government bonds with the interest thereon to accrue to respondent (Tr. 39-42, incl.). Appellant moved to strike the entire answer of Mr. Beesley as being violative of the parol evidence rule (Tr. 42, 43), which was denied pro forma (Tr. 43) Appellant renewed its motion to strike the testimony of the witness Beesley with respect to the conversation with Fisher Harris as being violative of the parol evidence rule (Tr. 60, 61), which the trial court denied (Tr. 67). We submit that under the authorities cited above the trial court erred in receiving such parol evidence over the objection of appellant. In so doing, it permitted respondent to impeach a provision of a written contract executed by it over sixteen years ago with all of the formalities of an election and the resolutions of its Board by the testimony of one witness as to his memory sixteen years prior.

The fact is that the Amendatory Subscription Contract is clear and unambiguous in its terms. There is no ambiguity to explain. The claimed oral agreement which respondent was successful in persuading the trial court to enforce imposes upon appellant the duties of a trustee, requires it to keep the \$6,000.00 invested at the highest rate of interest consistent with safety, holds it accountable to

respondent for the interest earned on the investment, requires it to hold the \$6,000.00 and all interest thereon separate and apart from all other moneys of appellant, and requires it to give respondent credit for all interest on any payments, whether classed as installments, assessments or otherwise, which may hereafter become due to appellant from respondent. How can it be said that this does not impose duties and obligations on appellant in addition to those it assumed under the written contract? The additional duties and obligations imposed on appellant thereby clearly alter, if not repudiate, the express written terms of the Amendatory Subscription Contract. In addition thereto, it gives the respondent more than it bargained for, i.e. the interest earned on money already paid under the express terms of the Amendatory Subscription Contract to appellant on the purchase price of the stock.

To say that such an oral agreement merely explains the particular provision of the written contract is absurd, particularly where there is no ambiguity to explain. On the contrary, the claimed oral agreement not only alters and modifies the terms of the written contract but completely and radically changes it in purpose and effect, if not repudiates it. This is a classic example of the wisdom in the parol evidence rule, which appropriately has become known as a "common sense rule". *Jensen Used Cars v. Rice*, 7 Utah (2d) 276, 323 Pac. (2d) 259. Under no circumstances was parol evidence of

the conversations admissible in this case, and the trial court clearly erred in receiving such evidence over the objection of appellant.

POINT III.

THERE IS NO COMPETENT EVIDENCE TO SUPPORT THE FINDINGS OF THE TRIAL COURT THAT THE \$6,000.00 WAS CONDITIONALLY DELIVERED TO APPELLANT UPON A MUTUAL UNDERSTANDING THAT THE SAME WOULD BE INVESTED AND THE INTEREST RECEIVED FROM SUCH INVESTMENT WOULD ACCRUE TO RESPONDENT OR THAT APPELLANT WAS BOUND THEREBY.

In spite of the fact that the trial court erroneously received parol evidence to show that a claimed oral agreement or understanding had been reached between respondent and appellant, respondent still offered no competent evidence from which the trial court could find that the \$6,000.00 check was delivered to appellant upon a mutual understanding that the proceeds would be held and invested by appellant until such time as payment to the United States would be required under appellant's contract with the United States and that the interest received from such investment would accrue to the credit of respondent.

The *only* evidence offered by respondent as to the claimed oral agreement prior to the execution of the Amendatory Subscription Contract of February 3, 1947 was the testimony of the witness John O. Beesley, over appellant's objection (Tr. 39), relating to one conversation with Fisher Harris, one

of appellant's directors and its counsel, shortly after November 8, 1946 (Tr. 39-42, incl.). The testimony of Fisher Harris refutes any such conversation (Tr. 108), although apparently the trial court chose to believe Mr. Beesley. Mr. Beesley testified that he had a meeting with Mr. Harris shortly after November 8, 1946 in Salt Lake City, Utah and that only he and Mr. Harris were present (Tr. 40). Mr. Beesley testified that he suggested a plan or scheme to Mr. Harris whereby respondent could avoid exceeding its debt limitation by advancing the \$6,000.00 to appellant and that the money be invested in government bonds and the interest accrue to the respondent (Tr. 41). Mr. Beesley was unable to state the substance of the statements of Mr. Harris in response thereto (Tr. 41, 42), but merely suggested that it met with the approval of Mr. Harris (Tr. 42). Appellant moved to strike the entire answer of Mr. Beesley as not binding on appellant (Tr. 42), which was denied pro forma (Tr. 43). Appellant renewed its motion to strike the testimony of the witness Beesley with respect to the conversation with Fisher Harris individually as not binding on appellant corporation (Tr. 59, 60), which was denied (Tr. 67).

Even assuming what Mr. Beesley said to be true, which apparently the trial court believed, certainly the appellant corporation is not bound by any oral "approval" by director Harris (which he denies) given during a conference solely between him

and the witness John O. Beesley. The law is well settled that in order to bind a corporation the Board must act as a Board, either in a regular session or special session called for a purpose. *Lockwitz v. Pine Tree Mine & Mill Company*, 37 Utah 349, 108 Pac. 1128, *Jackson v. Bonneville Irrigation District*, 66 Utah 404, 243 Pac. 107. The then existing Section 18-2-20, Utah Code Annotated 1943 specifically provided that the corporate powers of the corporation shall be exercised by the Board of Directors. And in *13 Am. Jur., Corporations, Section 948, p. 909* it is stated:

“The authority of the directors or trustees is conferred upon them as a board, and they can bind the corporation only by acting together as a board. A majority of them in their individual names cannot act for the board itself and bind the corporation. In order to exercise their powers they must meet so that they may hear each other’s views, deliberate, and then decide . . .”

Thus, respondent cannot rely on the alleged conversation between the witness John O. Beesley and director Harris as binding on the appellant corporation, and it was error for the trial court to attempt to so bind the appellant corporation. That being the only evidence offered by respondent to support its claim that such an oral agreement had been reached prior to the execution of the Amendatory Subscription Contract, the finding of the trial court thereon cannot stand and must be set aside.

We are mindful of the rule that the trial court as the trier of the fact has great latitude in determining the truth of the facts in issue. However, in so doing it cannot rely on incompetent evidence and close its eyes to competent evidence which is undisputed. Thus, in the instant case all of the documentary evidence as to the events which led up to the execution of the Amendatory Subscription Contract on February 3, 1947 negative any agreement or understanding between the parties prior to the execution thereof with respect to the accrual of interest on the \$6,000.00 payment. Respondent's own records negative this.

Thus, in the minutes of the meeting of the Board of Directors of respondent dated November 20, 1946 (Df. Exh. 25) where the proposed Amendatory Subscription Contract was approved by respondent, including the payment of \$6,000.00, no reference is made therein pertaining to the investment or accrual of interest on the \$6,000.00. Nor does the Ordinance passed by respondent on November 20, 1946 (Df. Exh. 24) and submitted to a vote of its electorate on December 4, 1946 (Df. Exh. 25) make any reference to the investment of the \$6,000.00 or to the accrual of interest thereon. *In fact, the Ordinance told the people of the respondent District that the \$6,000.00 had been paid to the appellant and its indebtedness to appellant had been reduced by that amount.*

Furthermore, no reference is made to the investment of the \$6,000.00 nor to the accrual of interest to respondent in the minutes of

Board of Directors' meeting of appellant on November 8, 1946 (Df. Exh. 26), although Mr. Beesley noted that a problem would arise as to respondent's exceeding its debt limitation;

Special Stockholders' meeting of appellant dated December 20, 1946 (Df. Exh. 27), wherein the supplemental contract between appellant and the United States was approved by the stockholders;

Special Board of Directors' meeting of appellant on December 20, 1946 (Df. Exh. 28), wherein the execution of the supplemental contract between appellant and the United States was approved; or the

Board of Directors' meeting of appellant on February 5, 1947 (Df. Exh. 31).

However, at the annual Stockholders' meeting of appellant on February 5, 1947 attended by Mr. Beesley, representing respondent (Df. Exh. 29), it was unanimously resolved by all of the stockholders, including respondent, that the amount of \$6,000.00 be credited to the account of respondent on its contractual obligation for the purchase of stock in the appellant and that it be deducted from the first contract assessments. This meeting was only two

days after the execution of the Amendatory Subscription Contract, and still no mention was made of the so-called prior agreement or understanding to invest the \$6,000.00 and credit the interest thereon to respondent. It is inconceivable that if such a prior agreement was reached that respondent would not even mention it, and then vote in favor of the foregoing resolution without such agreement's being incorporated therein. It was only at a subsequent meeting, being nearly six weeks after the execution of the Amendatory Subscription Contract, that the matter of investing the \$6,000.00 and the accrual of interest to the credit of the respondent was first mentioned in any minute or document (Pl. Exh. 1, p. 3). Although we might now criticize the motion contained in the foregoing minutes as being unwise, in law and in fact the effect thereof can only be a gratuity for which no consideration was given and has since been revoked by appellant as will be hereinafter demonstrated. Suffice it to say the foregoing resolution forms the basis for respondent's contentions in this case. It should be obvious from all of the documentary evidence that the alleged oral agreement is simply a figment of somebody's imagination and came as an after-thought to the purely gratuitous motion approved by appellant's directors on March 14, 1947.

POINT. IV.

THE CLAIMED ORAL AGREEMENT WOULD BE VOID AS BEING AN ILLEGAL CONTRACT TO VIOLATE THE PROVISIONS OF THE THEN EXISTING

SECTION 100-10-18 (g), UTAH CODE ANNOTATED 1943, AND THE TRIAL COURT ERRED IN ITS CONCLUSIONS AND JUDGMENT IN ENFORCING THE SAME.

The trial court found that respondent delivered to appellant its check in the sum of \$6,000.00 pursuant to an oral agreement under the terms of which the proceeds would be held and invested by appellant until such time as payments to the United States would be required under appellant's contract with the United States, with the interest received from such investment to accrue to the credit of respondent (Fdgs. 6, 7 — Tr. 121). By its Judgment the trial court purports to enforce such oral agreement (Judgment—Tr. 125).

We can only conclude therefrom that the indebtedness of respondent to appellant has not yet been reduced by \$6,000.00, nor will it so be reduced until appellant levies an assessment against its stockholders to obtain the funds necessary to make appellant's first annual payment to the United States under the \$11,400,000.00 contract (Pl. Exh. 5). Yet unless respondent's indebtedness to appellant was reduced by \$6,000.00 at some time prior to the execution of the Amendatory Subscription Contract dated February 3, 1947 the indebtedness incurred by respondent thereby exceeded respondent's debt limitation imposed by the then existing Section 100-10-18 (g), Utah Code Annotated 1943 by the sum of \$6,000.00. This we repeatedly called to the attention of the trial court, which it inten-

tionally ignored (Tr. 22, 30). That section fixed a limitation on the aggregate indebtedness of metropolitan water districts at 10% of the assessed valuation of all taxable property within the district. It was amended in 1957 to exclude any indebtedness to a water users association (appellant) from which the district procures water. *Section 73-8-18 (g), Utah Code Annotated 1953*, as amended by *Laws of Utah 1957, Chapter 159, Section 1*.

The fundamental purpose in paying the \$6,000.00 to appellant at that time was to avoid respondent's exceeding its statutory debt limitation. Respondent so alleges in its Complaint (Complaint, par. 6 — Tr. 4, 5). So states the resolution adopted by appellant's stockholders, including respondent (Df. Exh. 29, p. 3). The witness John O. Beesley, as chairman of the Board of Directors of respondent, so testified (Tr. 37) and the trial court so found (Fdg. 6, R. 121). That being so, the very purpose and effect of the claimed oral agreement found by the trial court would violate the then existing Section 100-10-18 (g), *Utah Code Annotated 1943*. Yet the trial court enforced the claimed oral agreement in spite of the law adopted in this state and in the whole country that every contract in violation of law is void. Thus, in the case of *Baker v. Latses*, 60 Utah 38, 206 Pac. 553, this court states on page 555 of the Pacific Reporter:

“It is the generally accepted doctrine of this country that every contract in violation

of law is void. It is equally true that our courts will not lend their aid to the enforcement nor permit a recovery of compensation under contracts made and entered into in violation of the law prohibiting them or declaring them to be unlawful." (Citing *Haddock v. Salt Lake City*, 23 Utah 521, 65 Pac. 491)

Under the claimed oral agreement which the trial court saw fit to enforce ownership of the \$6,000.00 could not under any circumstance pass to appellant. That being so, there could be no corresponding reduction in the indebtedness of respondent to appellant. All that could pass to appellant would be the bear legal title with conditions imposed, and the equitable title would remain in the respondent. *54 Am. Jur., Trusts, Section 96, p. 89; Section 98, p. 90.* And so we ask, under what possible theory could such a transaction operate to reduce the indebtedness of respondent to appellant? We submit that there is none.

Nor can it be said that the payment of the \$6,000.00 to appellant operated as a reduction of some other indebtedness of respondent. Respondent was not, and is not indebted to the United States for respondent's share of the cost of the Project. *No contract exists between respondent and the United States whereby respondent is or ever was obligated to pay one red cent to the United States on this Project.* Furthermore, the money was not paid over to the United States. Respondent's indebtedness is, and always has been to the appellant un-

der the original and Amendatory Stock Subscription Contract. Appellant is the one which is solely indebted to the United States and is the only one to whom the United States can look for payment.

Respondent apparently concedes that its indebtedness to appellant was reduced by \$6,000.00 at the time the Amendatory Subscription Contract dated February 3, 1947 was entered into (R. 22). It makes this concession apparently in an effort to avoid having exceeded its debt limitation, and at the same time asserts that it has retained the equitable ownership of the \$6,000.00 and all benefits accruing therefrom. We respectfully submit that the two cannot co-exist. The former is conclusively established by the record before this court. The latter is predicated upon a claimed oral agreement which is not only contrary to the express provisions of the written Amendatory Subscription Contract but, if ever made, would be clearly illegal as a violation of the debt limitation statute and as such the trial court erred in enforcing the same.

POINT V.

THE CLAIMED ORAL AGREEMENT WOULD NULLIFY THE ELECTION OF THE VOTERS OF RESPONDENT DISTRICT HELD ON DECEMBER 4, 1946 TO APPROVE THE PROPOSED AMENDATORY SUBSCRIPTION CONTRACT AND WOULD VOID THE AMENDATORY SUBSCRIPTION CONTRACT DATED FEBRUARY 3, 1947 AND THE EXECUTION THEREOF.

On December 2, 1946 respondent delivered to appellant its check in the amount of \$6,000.00. Two

days later the proposition voted on by the electorate of the respondent District on December 4, 1946 was as follows:

“Shall the Metropolitan Water District of Provo City be authorized to enter into an amendatory contract with the Provo River Water Users’ Association for the purpose of continuing construction of the Deer Creek Division of the Provo River Project for accruing a water supply for the District, *on terms and conditions set forth in the ordinance by which this election is called?* (Emphasis added) (Df. Exh. 24, Ordinance, Section 9)

The foregoing Ordinance set out verbatim the terms of the proposed Amendatory Subscription Contract, including the whole of paragraph 15 (Df. Exh. 24). Section 13 of the foregoing Ordinance required publication thereof in a newspaper or posting the same in three public places. Section 14 thereof required that a copy of the Ordinance be posted in a conspicuous position in each polling place and each voting booth. The Ordinance told the people that \$6,000.00 had been paid to appellant on the purchase price of the stock and that the indebtedness had been reduced by that amount. It was upon those terms and conditions that the majority of the electorate voted in favor of the proposition and approved the Amendatory Subscription Contract (Df. Exh. 25). And it is conceivable that had the terms and conditions been otherwise the voters would have rejected the proposition.

Pursuant to the mandate of its voters, the Board of Directors of the respondent District auth-

orized the execution of the Amendatory Subscription Contract (Df. Exh. 25). Having told its voters that the \$6,000.00 had been paid and by reason thereof the indebtedness had been reduced by that amount, and having so agreed in the Amendatory Subscription Contract, how can respondent be heard to now say otherwise?

For the trial court to now find that by reason of the oral agreement respondent had not in fact made a payment of \$6,000.00 on the purchase price of the stock, with no corresponding reduction in its indebtedness, is not only contrary to the express language of the Amendatory Subscription Contract but is in effect a determination that the Amendatory Subscription Contract obligated respondent for an indebtedness of \$6,000.00 more than the electorate approved and \$6,000.00 more than the Board of Directors of the respondent District authorized its officers to incur. We point this out not by way of urging that this court hold that the Amendatory Subscription Contract is void, but to point out the fallacy of respondent's theory of the case and the dilemma created by the Findings, Conclusions and Judgment of the trial court.

POINT VI.

RESPONDENT ACQUIRED NO RIGHTS IN AND TO THE INTEREST ACCRUALS FROM THE INVESTMENT OF THE \$6,000.00 PAYMENT BY REASON OF THE MOTION PASSED AT THE APPELLANT DIRECTORS' MEETING OF MARCH 14, 1947.

On March 14, 1947, being six weeks after

the execution of the Amendatory Subscription Contract, the Board of Directors of appellant corporation passed the following motion:

“It was moved by attorney Harris that the \$6,000.00 paid by the Metropolitan Water District of Provo on its subscription contract be not mingled with the Association’s general funds, but that it be placed in a separate account and invested at the highest rate of interest consistent with safety; the president, treasurer and Mr. Beesley be and are hereby authorized to make the investment and report their action. Interest on the investment to accrue to the credit of the Metropolitan Water District.” (Fds. 9, 10 — R. 122; Pl. Exh. 1, p. 3)

Prior to that date nothing appeared in any of the documentary evidence as to the investment of the \$6,000.00 or the accrual of interest thereon to the credit of respondent. The trial court found that the foregoing resolution was made “in recognition of and in pursuance of the mutual understanding referred to herein . . .” and undoubtedly this resolution was influential, if not determinative, in the decision of the trial court. What the trial court refused to consider is that all of the negotiations, arrangements and the like which occurred prior to or contemporaneously with the execution of the Amendatory Subscription Contract merged into that contract and are past history. Appellant raised a timely objection thereto (Tr. 32), which the trial court denied (Tr. 33).

We can only look to the terms of the Amendatory Subscription Contract to ascertain the rights, duties and obligations of the parties thereto as of February 3, 1947 pertaining to the subject matter of the contract. Any subsequent enforceable agreement must stand or fall on a new consideration or lack of consideration. The record is clear that the foregoing motion was not founded on any consideration's passing from respondent to appellant. No evidence was offered by respondent to show that any consideration passed, and we do not believe that respondent seriously contends otherwise. Yet respondent urged that the trial court invoke its powers of equity to find some equitable principal under which respondent might be entitled to the interest earned on appellant's investment, i.e. that either an implied or constructive contract or a resulting trust had been created by reason of appellant's actions. However, respondent ignores the elementary concept that each and every equitable principle must be founded on a valuable consideration. *12 Am. Jur., Contracts, Section 6, p. 504; 54 Am. Jur., Trusts, Section 194, p. 153.*

We might now criticize the resolution adopted by appellant on March 14, 1947 as being unwise, but in law and in fact the effect thereof can only be an intention to make a gift at some time in the future and it has since been revoked by appellant (*24 Am. Jur., Gifts, Section 2, pp. 730, 731; Section 38, p. 752*). Revocation of any prior intention of making

a gift is manifested in the minutes of the appellant Directors' meetings held on March 11, 1955 (Pl. Exh. 8, p. 2), again on April 8, 1960 (Df. Exh. 30, p. 1) and was expressly revoked at the appellant's Directors' meeting of April 20, 1962, as amended May 18, 1962 (Pl. Exh. 21, p. 5).

Furthermore, appellant had no power to make a gift. *13 Am. Jur., Corporations, Section 806, p. 820*. It would be akin to a charitable gift by a non-charitable corporation, which are generally held to be *ultra vires* unless beneficial to the corporation. *Union Pacific Railroad Company v. Trustees, Inc.*, 8 Utah (2d) 101, 329 Pac. (2d) 398. Appellant certainly would not benefit therefrom. The then existing Section 18-2-16, Utah Code Annotated 1943 (Section 16-2-14, Utah Code Annotated 1953) did not expressly empower corporations organized thereunder to make a gift, and a strict interpretation is to be given to the express powers of a corporation. *Zions Savings Bank & Trust Company v. Tropic and East Fork Irrigation Company*, 102 Utah 101, 126 Pac. (2d) 1053; *Summit Range & Livestock Co. v. Rees*, 1 Utah (2d) 195, 265 Pac. (2d) 381.

Nor does the resolution of appellant's Board of Directors dated March 14, 1947 constitute a ratification of the claimed oral agreement since to be an effective ratification by the corporation it must be accompanied by an intent to ratify the unauthorized transaction. *13 Am. Jur., Corporations, Section 977, p. 930*. No mention is made therein that a prior

oral agreement had been made which the corporation was thereby intending to ratify, nor is there any evidence at any place in the record manifesting such intent. Furthermore, the claimed prior oral agreement would be an agreement to violate the debt limitation statute as demonstrated under Point IV above, and a corporation cannot ratify a contract which is illegal or opposed to public policy. *13 Am. Jur., Corporations, Section 980, p. 932; 7 A.L.R. 1446, 1494.*

Admittedly, the foregoing resolution, its creation and existence are difficult to explain. The witness Fisher Harris, who made the motion, has no independent recollection of the facts or circumstances which surrounded or prompted the motion (Tr. 111). He did testify, however, that when the Amendatory Subscription Contract was executed on February 3, 1947 it was expected that the payments under the \$11,400,000.00 contract would begin in the near future (Tr. 117). We can only surmise that it was not expected to accumulate enough interest over which to argue.

However, when the "excess costs" contract was executed on February 2, 1949, thereby suspending payments by the appellant to the United States under the \$11,400,000.00 contract before they began, the interest attributed to the investment of the \$6,000.00 began to accumulate and reached the sum of \$2,258.92 as of December 31, 1961. In principle the amount of the accumulated interest should have

no bearing on this controversy. However, as a practical matter it did.

And having once reached the litigation stage, the rights, duties and obligations of the parties must be settled on accepted principles of law and not on the basis of a gratuitous resolution appearing in the records of the appellant, which can only have the legal effect of a declaration of an intention to make a gift at some time in the future. No enforceable rights were created in respondent thereby and the trial court clearly erred in attempting to enforce the same.

POINT VII.

THE TRIAL COURT ERRED IN MAKING FINDINGS OF FACT NOS. 9 TO 14, INCLUSIVE, AS TO EVENTS SUBSEQUENT TO THE EXECUTION OF THE AMENDATORY SUBSCRIPTION CONTRACT BETWEEN THE PARTIES DATED FEBRUARY 3, 1947.

The only purpose for which evidence of events subsequent to the Amendatory Subscription Contract could be offered would be to show that the Amendatory Subscription Contract thereafter had been amended or that new rights and duties of the parties had been created with reference to the \$6,000.00. However, such evidence was not offered by respondent for that purpose but was offered for the purpose of showing a "confirmation of a prior understanding (Tr. 32, 50). Appellant made timely objections to all of such evidence (Tr. 32, 50, 51), which objections the trial court denied (Tr. 33, 51, 52).

Even so, respondent cannot successfully claim that the Amendatory Subscription Contract dated February 3, 1947 was amended by the resolution of appellant's Board of Directors dated March 14, 1947. No consideration passed therefor. The minute entry does not constitute an agreement or contract which would be binding on appellant. It is unilateral and nowhere in the record does it appear that the Board of Directors of the respondent District thereafter approved, agreed thereto or even commented thereon. It was strictly a declaration of intention by the Board of Directors of appellant to at most make a gift to respondent at some time in the future. What is more, the Board of Directors of appellant had no authority to bind the corporation to such a declaration. And so, with the entries made by the auditors employed by appellant to make the auditor's reports. Certainly they have no power to bind the appellant by employing inept language sounding in legal opinions. Furthermore, the record does not show that such auditor's reports were ever formally approved by the Board of Directors of appellant. In fact, the testimony of the witness John O. Beesley shows affirmatively that no formal board action was taken thereon (Tr. 56).

The trial court made no finding that the Amendatory Subscription Contract dated February 3, 1947 had been amended by the resolution of the Board of Directors of appellant, nor that any new rights, duties or obligations of the parties were cre-

ated thereby. Thus, Findings Nos. 9 through 14, inclusive, covering events subsequent to the execution of the Amendatory Subscription Contract dated February 3, 1947 are immaterial and it was error for the trial court to make findings thereon as a basis for its Conclusions Of Law and Judgment.

POINT VIII.

THE COURT ERRED IN ITS JUDGMENT BY GRANTING RELIEF TO RESPONDENT BEYOND THAT TO WHICH IT WAS ENTITLED OR CLAIMED AND BEYOND THE PLEADINGS AND PROOF IN THIS CASE.

The affirmative relief sought by respondent in its Complaint was to compel appellant to hold the \$6,000.00 and all interest accumulations thereon to respondent's credit and to pay over such amounts to the United States when, as and if moneys become due and payable from appellant to the United States under appellant's contract with the United States.

The Judgment of the trial court went far beyond, and orders appellant to

(a) keep the \$6,000.00 invested at the highest rate of interest consistent with safety;

(b) pay the \$6,000.00 over to the United States when payments become due to the United States by appellant, and give respondent credit for \$6,000.00 on the first payment which will become due to appellant by respondent under respondent's contract with appellant; and

(c) give respondent credit for any interest and dividends heretofore or hereafter received by appellant attributable to the investment of the \$6,000.00, including interest on interest, on any payments, whether classed as installments, assessments or otherwise, which may hereafter become due to appellant by respondent under respondent's stock subscription contract with appellant.

At no point during the trial of this case did respondent claim more than the right to require appellant to pay the \$6,000.00 and any earnings thereon over to the United States when the first installment became due from appellant to the United States on the \$11,400,000.00 contract (Tr. 4, 14, 15, 16, 18, 71, 72, 75 and 76). Yet the trial court went much further and made the appellant an investor for the respondent, and conceivably liable for any loss resulting from a bad investment; and requires appellant to give respondent credit to the extent of the accumulated income on any assessment, whether it be one for operation and maintenance or some purely corporation expense or otherwise, whenever and in whatever amount thereof respondent may see fit to ask for a credit. The Judgment does not even permit appellant to pay the money over to the United States now and relieve itself of the fiduciary duties imposed on it by the trial court.

We are mindful that under *Rule 54 (c), Utah*

Rules of Civil Procedure the Judgment shall grant the relief to which the party in whose favor it is rendered is entitled even if the party has not demanded such relief in his pleadings. However, this rule does not permit an adjudication of an issue which was never raised at the pleading stage or during the trial of the case which the defendant was never called upon to meet. *Taylor v. E. M. Royle Corporation*, 1 Utah (2d) 175, 264 Pac. (2d) 279. In the instant case no issue was ever raised as to the right of respondent to receive a credit for the interest accumulations on any assessment except the one which will be levied by appellant to raise sufficient funds to pay the first installment to the United States on the \$11,400,000.00 contract. Never did it claim the right to credit the interest accumulations on assessments levied for operation and maintenance or general corporate expense. It follows that the Judgment of the trial court in granting respondent relief beyond the pleadings and proof in this case must be reversed.

CONCLUSION

The \$6,000.00, when made, was a payment on the purchase price of the stock. The indebtedness of respondent to appellant was thereby reduced by \$6,000.00. The parties so agreed in the formal written Amendatory Subscription Contract. As such the \$6,000.00 became the property of appellant and as owner thereof appellant was entitled to any income derived from the investment thereof.

When respondent paid the \$6,000.00 it got exactly what it bargained for, i.e. a reduction in its indebtedness to appellant by \$6,000.00, as the Amendatory Subscription Contract expressly provides, and nothing more nor anything less. Respondent isn't out anything save and except a profit earned on appellant's investment. Nor has appellant gained anything at the expense of respondent.

The avowed purpose in respondent's paying the \$6,000.00 to appellant was to avoid incurring an indebtedness in excess of respondent's statutory debt limitation. Any claimed agreement, the effect of which would not reduce respondent's indebtedness by the \$6,000.00 paid, would be an illegal contract to violate the debt limitation statute. The claimed oral agreement enforced by the trial court has just that illegal effect. Furthermore, the effect thereof would nullify the election of the voters of respondent District and would void the execution of the Amendatory Subscription Contract by exceeding the statutory debt limitation of respondent and the authority granted to the officers of respondent to execute the same.

The rights, duties and obligations of the parties pertaining to the \$6,000.00 were determined and fixed by the Amendatory Subscription Contract as of February 3, 1947. The trial court erred in receiving evidence of conversations prior thereto as attempting to alter and impeach the applicable provision of the formal written contract.

There was no competent evidence offered to support the claimed oral agreement enforced by the trial court. All of the documentary evidence negatives any such agreement's having been made. It hinges solely on one claimed conversation with one of the directors of appellant which, if had, is not binding on the corporation.

The action taken by the directors of appellant corporation six weeks subsequent to the execution of the written contract has no legal effect. It does not make out an enforceable contract since it was a unilateral declaration for which no consideration passed. Nor was it a ratification of a prior unauthorized act, since no intent to ratify is manifested therein and in any event appellant corporation could not ratify an illegal contract.

The Findings Of Fact are not supported by competent evidence and the Conclusions Of Law and Judgment grants respondent relief beyond that ever claimed and beyond the pleadings and proof in this case.

We respectfully submit that the record in this case compels setting aside the Findings Of Fact, Conclusions Of Law and the unequivocal reversal of the Judgment of the trial court.

Respectfully submitted,

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